

July 6, 2007

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Citizen Action New Mexico

Date of Filing: May 2, 2007

Case Number: TFA-0203

On May 2, 2007, Citizen Action New Mexico (CANM) filed an Appeal from a determination issued to it on April 4, 2007, by the National Nuclear Security Administration of the Department of Energy in Albuquerque, New Mexico (DOE/AL) in response to a request for documents that CANM submitted under the Freedom of Information Act (FOIA), 5 U.S.C. ' 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require that DOE/AL perform an additional search for responsive material and provide further identification of two released documents.

I. Background

On October 2, 2006, CANM filed a FOIA request with DOE/AL for the following information: (1) the site-wide ground water surveillance monitoring plan prepared by Sandia National Laboratories (SNL), New Mexico; (2) a copy of the status report submitted to comply with a DOE Executive Order, DOE O 450.1; (3) all other documents used in conjunction with the monitoring plan and the status report; (4) any document that was provided to the New Mexico Environment Department for compliance with requirements of DOE O 450.1; and (5) documents which show the funding mechanisms for the surveillance monitoring plan on an annual basis as specific budgetary items. Letter from DOE/AL to CANM (April 4, 2007) (Determination Letter).¹ In its response to the request, DOE/AL asserted that there was no requirement in DOE O 450.1 for a "site-wide groundwater monitoring plan" or a written status report, and thus none was prepared. Nonetheless, DOE/AL released in their entirety two documents that dealt with similar subject matter, namely: (1) the SNL Environmental Monitoring and Surveillance Plan, undated, and (2) the SNL Groundwater Protection Program Plan for FY 2007, dated September 2006. DOE/AL explained that because the status report and groundwater monitoring plan were not required, there were no responsive records in its possession in response to Items 2, 3, 4, and 5. *Id.* In the Appeal, CANM challenged the adequacy of the search, the agency's failure to respond within time limits, insufficient identification of documents and the alleged withholding of a "controlled document." Letter from CANM to Director, OHA (May 2, 2007) (Appeal).

¹ DOE Order 450.1 was created "to implement sound stewardship practices that are protective of the . . . natural and cultural resources impacted by DOE operations. . . ." DOE O 450.1. This objective is accomplished by implementing Environmental Management Systems (EMSs), activities to achieve environmental goals, at DOE sites. EMSs must be part of Integrated Safety Management systems (ISMSs). *Id.*

II. Analysis

In responding to a request for information filed under the FOIA, it is well established that an agency must conduct a search reasonably calculated to uncover all relevant documents. *Truitt v. Department of State*, 897 F.2d 540, 542 (D.C. Cir. 1990). The standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials. *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985); accord *Truitt*, 897 F.2d at 542. We have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. See, e.g., *Doris M. Harthun*, 28 DOE & 80,282 (January 7, 2003) (Case No.TFA-0015).

We contacted DOE/AL for information regarding its search for responsive information. DOE/AL told us that it searched all records in its possession and released all responsive material to CANM along with the determination letter. DOE/AL also provided replies to the four issues raised in this appeal.

A. Adequacy of Search for Status Report

CANM argues in its Appeal that DOE O 450.1 requires SNL to submit a status report by December 31, 2005. As authority, it cites DOE O 450.1 chg 2, dated December 7, 2005. DOE/AL refutes that argument and contends that SNL's Environmental Programs and Assurance Department reviewed the order, but was unable to identify the requirement CANM stated in its request. According to SNL, it has never prepared a "site-wide ground water surveillance monitoring plan." Letter from Juanita Evans, Corporate Contract & Policy Management, SNL, to Andrea Leal, DOE/NNSA (May 9, 2007). Nonetheless, SNL did release two internal monitoring planning documents that deal with the same subject area, "SNL Environmental Monitoring and Surveillance Plan" and "SNL Groundwater Protection Program Plan for Fiscal Year 2007." *Id.*

We reviewed the order, and found that it contains several references to December 31, 2005, as a deadline by which all sites should have implemented the management system requirements of the order. Section 5(d)(1) states that operations, field or site office managers must report to the Cognizant Secretarial Officer the status regarding whether the EMS requirements of the order have been integrated into the ISMSs by site contractors. However, the order does not specify that field managers must submit a written report confirming the status of their environmental activities. Therefore, we find that SNL's response was reasonable.

B. Failure to Respond Within Time Limits

CANM challenges the timeliness of DOE/AL's response to his FOIA request. However, this office does not have jurisdiction to consider appeals concerning the timeliness of the agency's response to FOIA requests. 10 C.F.R. § 1004.8; see also *Arlie Bryan Siebert*, 29 DOE ¶ 80,258 (April 20, 2006) (Case No. TFA-0157); *R.E.V. Engineering Services*, 28 DOE ¶ 80,136 (January 10, 2001) (Case No.

VFA-0636). Accordingly, we will dismiss the portion of the appeal concerning the timeliness of DOE's response.²

C. Insufficient Identification

CANM contends that the Environmental Monitoring and Surveillance Plan was not signed, dated, or identified as a status report created to comply with DOE O 450.1. In response to our inquiry, SNL explained that according to its interpretation of the order, there are no "compliance directives" in DOE O 450.1. Memorandum from Andrea Leal, DOE/NNSA, to Carolyn Becknell, NNSA FOIA Officer, DOE/AL (May 17, 2007). Nonetheless, the program plan that was submitted to comply with CANM's request for a "site-wide groundwater monitoring plan" sets forth the implementation of a site-wide approach for groundwater protection, and thus is responsive to CANM's request. As stated previously, there is no explicit requirement for a written status report. Because the responsive document was not created as a status report to comply with DOE O 450.1, it cannot be identified as such.

D. Controlled Document

The NNSA FOIA Officer released to CANM a copy of the program plan with the following statement at the bottom of each page: "Printed copies of this document are uncontrolled. The controlled copy is at http://www-irn.sandia.gov/esh/c_docs/prg.htm."

SNL explains that "controlled document" is synonymous with version control. The web version is the latest revision. Employees may print the web document, but their printed copies are not tracked (or controlled). Employees must refer to the web to verify that they have the latest version. The NNSA FOIA Officer sent CANM the latest revision. Letter from Juanita Evans, SNL, to Andrea Leal, DOE/NNSA (May 15, 2007).

CANM also contends that there were empty pages in the document. We contacted DOE/AL, and they informed us that there were no redactions made to the information released to CANM. Electronic mail message from Carolyn Becknell, NNSA FOIA Officer, DOE/AL, to Valerie Vance Adeyeye, OHA (June 8, 2007). Any blank spaces in the documents are due to format, and all new sections begin on a new page. *Id.*

III. Conclusion

After reviewing the record of this case, we find that DOE/AL conducted a search that was reasonably calculated to uncover the requested information. DOE/AL has reasonably explained why the status

² SNL explained that the delay in responding was due to a backlog of FOIA requests and the requirement that all FOIA materials that are not available in the public domain must first be reviewed by the SNL Classifications Department. Memorandum from Andrea Leal, NNSA, to Carolyn Becknell, NNSA FOIA Officer (May 17, 2007).

report that CANM requested does not exist, and released other responsive material to the requester. DOE/AL also explained that the document referred to by CANM as a "controlled document" was released to CANM in its latest version. Accordingly, this Appeal is denied.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Citizen Action New Mexico on May 2, 2007, OHA Case Number TFA-0203, is hereby denied except as set forth in Paragraph (2) below.

(2) The portion of the appeal concerning the timeliness of DOE's response to CANM's FOIA request is hereby dismissed.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. ' 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

William M. Schwartz
Senior FOIA Official
Office of Hearings and Appeals

Date: July 6, 2007